

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
JULY 16, 2008 Session

VALERIE ANN ARNOTT AVARITT. v. THOMAS WARREN AVARITT

Direct Appeal from the Chancery Court for Rutherford County
No. 04-8306DR Robert E. Corlew, III, Chancellor

No. M2007-01804-COA-R3-CV - Filed August 28, 2008

This is a divorce case. Husband/Appellant appeals the trial court's award of \$833 per month in alimony *in futuro* to Wife/Appellee. Finding that this is a case for rehabilitative alimony, we modify the trial court's order, awarding Appellee/Wife \$833 per month in rehabilitative alimony for a period of five years. Affirmed as modified.

Tenn. R. App. P. 3; Judgment of the Chancery Court Modified and Affirmed as Modified

J. STEVEN STAFFORD, J., delivered the opinion of the court, in which HOLLY M. KIRBY, J., and WALTER C. KURTZ, SR. J., joined.

William Kennerly Burger, Murfreesboro, TN for Appellant

Mitchell E. Shannon, Murfreesboro, TN for Appellee

OPINION

Appellant Thomas Warren Avaritt and Appellee Valerie Ann Arnott Avarit were married on September 13, 1980. Two children were born to the marriage, both of whom are now adults. At the time of the hearing, Mr. Avaritt was 46 years old and in good health. During the marriage, he obtained an advanced degree in accounting. He has worked for Standard Register Company since 1980, and has held various positions with the company. His most recent position was as an accounting assistant, making approximately \$48,000 per year.

At the time of the hearing, Ms. Avaritt was 47 years old. She has a high school degree and has taken some college classes, but does not have a degree. Ms. Avaritt testified that she has high blood pressure, acid reflux, takes hormone therapy, and suffers from depression for which she attends counseling. She suffered a severe back sprain 17 years ago and was prescribed an orthopedic device for her left foot due to problems encountered when standing for long periods of time. Ms.

Avaritt works 32 to 35 hours per week as a receptionist, and makes \$9.75 per hour or approximately \$17,500 per year.

On May 23, 2004, Ms. Avaritt filed for divorce, alleging irreconcilable differences, and inappropriate marital conduct. On June 21, 2004, Ms. Avaritt filed a motion for *pendente lite* spousal support. In September 2005, Mr. Avaritt filed his answer and counterclaim. In his answer, Mr. Avaritt admits irreconcilable differences, but denies any inappropriate marital conduct on his part. In his counterclaim, Mr. Avaritt asserts that Ms. Avaritt is guilty of inappropriate marital conduct.

Following the hearing on *pendente lite* support, the trial court entered an order on January 20, 2005, requiring Mr. Avaritt to pay \$575.00 every two weeks to Ms. Avaritt. In preparation for the final hearing, both parties submitted income and expense statements to the court. Therein, Ms. Avaritt asserted that she has a monthly, net income of approximately \$1,256.92, and monthly expenses of \$3,323.44. Mr. Avaritt's statement indicates a monthly net income of \$2,336.12, and monthly expenses of \$2,469.00.

The divorce hearing was held on February 9, 2005 and on April 26, 2005, the trial court entered its final judgment of divorce. Ms. Avaritt was granted an absolute divorce, and the marital debt and property was divided. Concerning spousal support, the trial court held, in pertinent part:

3. Given the extent and length of the marriage, and the disparities in income of the parties, [Mr. Avaritt] shall pay to [Ms. Avaritt] periodic alimony for a period of ten (10) years. Alimony shall be paid on a monthly basis, and it is the intent of this Court that the alimony paid by [Mr. Avaritt] to [Ms. Avaritt] shall have the effect of making their respective incomes equal during the months that it is paid. The parties shall take their monthly incomes, as reflected on their respective 12.01 statements, add them together, divide by two, and [Mr. Avaritt] shall pay to [Ms. Avaritt] the difference between [Ms. Avaritt's] monthly income and the averaged income of the two parties above....Said alimony shall terminate upon the death or remarriage of [Ms. Avaritt], should either occur before the end of the ten (10) year period....

Thereafter, the parties filed cross-motions to alter or amend the judgment, seeking, among other things, to have the exact dollar amount of spousal support set by the trial court. In response to these motions the trial court amended its final judgment of divorce as follows:

[I]t is **ORDERED** and **DECREED** that Defendant/Husband should pay to the Plaintiff/Wife the sum of eight hundred, thirty-three dollars and no/100 (\$833.00) per month as spousal support, for a period of

ten (10) years, consistent with the requirements as set forth in paragraph three (3) of the final judgment of divorce....

Mr. Avaritt appeals. The sole issue before this Court is whether the trial court erred in awarding spousal support in the amount of \$833 per month for 10 years.

We first note that, because this case was tried by the court sitting without a jury, we review the case *de novo* upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent error of law. *See* Tenn. R. App. P. 13(d). If the trial judge did not make specific findings of fact, we review the record to determine where the preponderance of the evidence lies. *Reagan v. Kindred Healthcare Operating, Inc.*, No. M2006-02191-COA-R3-CV, 2007 WL 4523092, *8 (Tenn. Ct. App. Dec. 20, 2007); *Hardcastle v. Harris*, 170 S.W.3d 67, 78-79 (Tenn. Ct. App. 2004). Furthermore, when the resolution of the issues in a case depends upon the truthfulness of witnesses, the trial judge who has the opportunity to observe the witnesses and their manner and demeanor while testifying is in a far better position than this Court to decide those issues. *See McCaleb v. Saturn Corp.*, 910 S.W.2d 412, 415 (Tenn.1995); *Whitaker v. Whitaker*, 957 S.W.2d 834, 837 (Tenn. Ct. App.1997). The weight, faith, and credit to be given to any witness' testimony lies in the first instance with the trier of fact, and the credibility accorded will be given great weight by the appellate court. *See id.*; *see also Walton v. Young*, 950 S.W.2d 956, 959 (Tenn.1997).

We review an award of alimony under the abuse of discretion standard. *Herrera v. Herrera*, 944 S.W.2d 379, 388 (Tenn. Ct. App.1996). Trial courts have broad discretion to determine whether spousal support is needed and, if so, the nature, amount, and duration of support. *See Garfinkel v. Garfinkel*, 945 S.W.2d 744, 748 (Tenn. Ct. App.1996). If a discretionary decision is within a range of acceptable alternatives, we will not substitute our judgment for that of the trial court simply because we may have chosen a different alternative. *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App.1999).

When determining whether an award of alimony is appropriate, courts must consider the statutory factors contained in Tenn. Code Ann. § 36-5-121(i) (2005). The two most important factors are the need of the spouse seeking support and the ability of the other spouse to provide such support. *See, e.g., Oakes v. Oakes*, 235 S.W.3d 152, 160 (Tenn. Ct. App.2007). Alimony decisions, by their very nature, typically hinge on the unique facts and circumstances of the case. *Id.* at 160; *see also Anderton v. Anderton*, 988 S.W.2d 675, 683 (Tenn. Ct. App.1998).

The relevant factors to be considered under Tenn. Code Ann. § 36-5-121(i) when determining whether to award alimony include:

- (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;

- (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;
- (3) The duration of the marriage;
- (4) The age and mental condition of each party;
- (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
- (7) The separate assets of each party, both real and personal, tangible and intangible;
- (8) The provisions made with regard to the marital property;
- (9) The standard of living of the parties established during the marriage;
- (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
- (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
- (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

Tenn. Code Ann. § 36-5-121(I).

Once the trial court has determined that alimony is appropriate, it must determine the nature, amount, and duration of the award. The court may award “rehabilitative alimony, alimony *in futuro* (also known as periodic alimony), transitional alimony, alimony *in solido*, (also known as lump sum alimony), or a combination of these...” Tenn. Code Ann. § 36-5-121(d)(1). T.C.A. § 36-5-121(d)(2) (2005) reflects a statutory preference favoring rehabilitative spousal support and transitional spousal support over long-term spousal support. *See also Bratton v. Bratton*, 136 S.W.3d 595, 605 (Tenn.2004); *Perry v. Perry*, 114 S.W.3d 465, 467 (Tenn.2003); *Crabtree v. Crabtree*, 16 S.W.3d 356, 358 (Tenn.2000). However, this statutory preference does not entirely displace the other forms of spousal support when the facts of the case warrant long-term or more open-ended support. *Aaron v. Aaron*, 909 S.W.2d 408, 410 (Tenn.1995).

The trial court awarded alimony *in futuro* (or periodic alimony) in the amount of \$833 per month for a period of ten years. In reaching its decision, the trial court reasoned that, “[g]iven the extent and length of the marriage, and the disparities in income of the parties...it is the intent of this Court that alimony...shall have the effect of making [the parties’] respective incomes equal during the months that [the alimony] is paid.” The testimony adduced at the hearing shows that, during the course of the marriage, Mr. Avaritt obtained a bachelor’s degree in accounting from Middle

Tennessee State University. Because Mr. Avaritt worked and attended classes simultaneously, it took him ten years to earn the degree. Ms. Avaritt testified that she had attended college many years earlier, but had not earned a degree. Furthermore, many of the hours she had earned in 1979-1980 were not applicable towards a current degree. Ms. Avaritt indicated that she would like the opportunity to pursue an advanced degree. From our review, it appears that the trial court's decision to award alimony for a period of ten years was based, in part, upon the fact that Mr. Avaritt had taken ten years to complete his own degree. Turning to the record, there is no indication that Ms. Avaritt has taken anything but cursory steps towards enrolling in college. Although she asserts that it is her intent to pursue a degree, there is no reliable evidence in the record from which to determine how long achieving this goal will take.

In addition, the record shows that both of these parties are disadvantaged in that the marital debt well exceeds the cumulative incomes of the parties. The parties fashioned their own property settlement, which the trial court adopted, and that issue is not before us. However, the division of property is one of the factors to be considered in determining the appropriateness of an alimony award. In this case, the division weighs in favor of Ms. Avaritt. She received the marital home, which has equity of approximately \$50,000 (notwithstanding the need for certain repairs) with approximately \$26,000 remaining on the debt. Mr. Avaritt received his 401(k), but incurred more marital debt.

Concerning the parties' respective work histories, Ms. Avaritt testified that she earns approximately \$9.25 per hour at Barclay & Associates. She works approximately 32 to 35 hours per week. With his degree, Mr. Avaritt was able to move into the accounting department at Standard Register, although he took a \$2.00 per hour reduction in pay to do so. Mr. Avaritt testified that he has not advanced in the accounting department, and that he is still working for an hourly rate. In order to make ends meet, Mr. Avaritt sometimes works packing boxes at Standard Register, and/or at another part-time job with Destination Nashville.

At the time of the hearing, Mr. Avaritt was 46 years old and in good health. Ms. Avaritt was 47 years old. According to her own testimony, she suffers from high blood pressure, anxiety, and problems with standing for long periods due to an earlier back injury. She is also taking hormone replacement therapy. Although Ms. Avaritt's testimony as to her medical issues is undisputed, there is no evidence in the record from which to determine whether any of these conditions (or combination thereof) will be a detriment to Ms. Avaritt's ability to work. As such we are unable to find that Ms. Avaritt is medically disqualified from performing the necessary functions of most jobs for which she is qualified.

From the totality of the circumstances, it appears that Ms. Avaritt has a need for alimony, and that, at this point, Mr. Avaritt has slightly more ability to pay. That being said, there is no indication that Ms. Avaritt's situation could not be improved with rehabilitative alimony, which is statutorily favored. Long-term spousal support, which the trial court ordered, is intended to provide long-term support to an economically disadvantaged spouse who is unable to be rehabilitated. *Burlew v. Burlew*, 40 S.W.3d 465, 471 (Tenn.2001); *Loria v. Loria*, 952 S.W.2d 836, 838 (Tenn.Ct.App.1997).

It is not, however, a guarantee that the recipient spouse will forever be able to enjoy a lifestyle equal to that of the obligor spouse. **Wright v. Quillen**, 83 S.W.3d 768, 773 (Tenn. Ct. App.2002). Rehabilitative spousal support is intended to enable an economically disadvantaged spouse to acquire additional education or training that will enable the spouse to achieve and maintain a standard of living comparable to the standard of living that existed during the marriage or to the post-divorce standard of living expected to be available to the other spouse. T.C.A. § 36-5-121(e)(1); *see also* **Robertson v. Robertson**, 76 S.W.3d 337, 340-41 (Tenn.2002); **Smith v. Smith**, 912 S.W.2d 155, 160 (Tenn. Ct. App.1995).

The record does not indicate that Ms. Avaritt is so disadvantaged in comparison to Mr. Avaritt that she cannot be rehabilitated. While we concede that she has need of alimony, and that the amount of \$833 per month appears to be within the range of reasonableness given the evidence in the record, we disagree that this alimony needs to continue *in futuro* for a period of ten years. The purpose of alimony is to ease the transition caused by divorce or separation. It is not to make one party the indentured servant of the other, nor is it to take away the obligee spouse's motivation to become independent. Based on our review, we conclude that the trial court should have awarded rehabilitative alimony to Ms. Avaritt, and that the period of this support should not exceed five years. This will give Ms. Avaritt time to find a more lucrative job, or to get her education, and to otherwise gain her independence. Because Mr. Avaritt currently makes more money, he is in a position to provide support for Ms. Avaritt. However, we cannot lose sight of the fact that Mr. Avaritt received no windfall in this divorce. Although there is some evidence that he is capable of moving up in his current position, there is no direct proof as to his ultimate earning capabilities. As in any divorce, there is a need for both parties to move forward in their respective lives. In this case, we find that rehabilitative alimony in the amount of \$833 per month for a period of five years will allow both parties to move toward this goal.

For the foregoing reasons, we modify the order of the court concerning the length of the alimony award. Mr. Avaritt shall pay to Ms. Avaritt, as rehabilitative alimony, the sum of \$833 per month for a period of five years, or until Ms. Avaritt's death or remarriage. The order is affirmed in all other respects. Costs of this appeal are assessed one-half to Appellant, Thomas Warren Avaritt and his surety, and one-half to Appellee, Valerie Ann Arnott Avaritt, for which execution may issue if necessary.

J. STEVEN STAFFORD, J.